



FH

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

[REDACTED]

DECISION

MPA/142024

PRELIMINARY RECITALS

Pursuant to a petition filed June 28, 2012, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Division of Health Care Access and Accountability in regard to Medical Assistance, a hearing was held on August 16, 2012, at Milwaukee, Wisconsin.

The issue for determination is whether the agency properly denied a request for Prior Authorization (PA) submitted on the Petitioner's behalf for speech language therapy services.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703

By: Patricia Willis

Division of Health Care Access and Accountability
1 West Wilson Street, Room 272
P.O. Box 309
Madison, WI 53707-0309

ADMINISTRATIVE LAW JUDGE:

Debra Bursinger
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a resident of Milwaukee County.

2. Petitioner is an 8 year old diagnosed with agenesis of the corpus callosum and autism. He has a symbolic language disorder and a mixed receptive/expressive language disorder.
3. Petitioner is a non-verbal communicator. He uses some sign language. He communicates his needs and wants by leading adults by the hand to show what he wants. He also communicates through blinking and vocalizations (moaning and groaning). The Petitioner's current language skills are assessed at a level of less than 12 months of age. Petitioner's family uses pictures for Petitioner to request his wants and needs.
4. The Petitioner receives 10 minutes/week of speech language therapy consult services at Milwaukee Public Schools. Previously, in 2011, the Petitioner received 60 minutes/week of speech language therapy with the West Allis/West Milwaukee public school district.
5. The Petitioner's IEP developed by Milwaukee Public Schools indicates the Petitioner's language skills are commensurate with his developmental levels. The goals of the IEP are for Petitioner to allow hand over hand assistance from an adult 3 out of 5 opportunities and to match pictures to pictures in 3 out of 5 opportunities.
6. A PA request submitted in February, 2012 for two speech language therapy sessions/week for 13 weeks was modified to authorize three sessions over a three month time frame to complete a home exercise program.
7. The current PA requests two sessions/week for 16 weeks of speech language therapy beginning May, 2012. It was noted that the sessions were requested because member would not be receiving services at school during the summer months.
8. The private therapist's plan of care contains a short term goal to have Petitioner communicate requests for a desired object/activity within structured routines and to appropriately initiate interaction. The long term functional outcome is for the Petitioner to communicate needs using varied communicative strategies at home and in the community.
9. The PA was denied on June 19, 2012.
10. An appeal was filed on the Petitioner's behalf with the Division of Hearings and Appeals on June 28, 2012.

DISCUSSION

Speech and language therapy is an MA-covered service, subject to prior authorization after the first 35 treatment days. Wis. Admin. Code, §DHS 107.18(2). In determining whether to approve such a therapy request, the DHCAA employs the generic prior authorization criteria found at §DHS 107.02(3)(e). Those criteria include the requirements that a service be medical necessary, appropriate, and an effective use of available services. Included in the definition of "medically necessary" at §DHS 101.03(96m) are the requirements that services not be duplicative of other services, and that services be cost effective when compared to alternative services accessible to the recipient. When speech therapy is requested for a school age child in addition to therapy provided by the school system, the request must substantiate the medical necessity of the additional therapy as well as the procedure for coordination of the therapies. Prior Authorization Guidelines Manual, Speech Therapy, page 113.001.03. It is up to the provider to justify the provision of the service. §DHS 107.02(3)(d)6.

Prior hearing decisions have held consistently that where speech therapy is provided in school, it would not be cost effective for MA to cover private therapy. If the private therapy covers a situation that school therapy does not address, it has been found that the services are not duplicative. See, for example, the final Decision in DHA Case No. MPA-48/16180, (Wis. Div. Hearings Appeals, August 21, 1997) where the evidence showed that the petitioner had a unique oral deficiency that the school therapist was not trained to address. Also see the Decision in DHA Case No. MPA-51/41838 (Wis. Div. Hearings Appeals,

November 18, 1999), where the school therapist was working on building vocabulary while the private therapist was working on the physical process of vocalizing sounds.

The Department, by then-Deputy Secretary Susan Reinardy held in DHA Final Decision No. MPA-37/80183 (Wis. Div. Hearings Appeals, February 16, 2007) (DHFS), another speech therapy appeal, that “the deciding factor in whether services are duplicative is not the [therapy] technique utilized by the therapists, but the goals and outcomes being addressed by the therapists.” Id. at 2. It does not matter, for example, if one provider addresses group activities with peers and the other one-on-one activities with an adult. A requested service duplicates “an existing service if the intended outcome of the two services is substantially the same.” Id. at 3. Her decision specifically rejected additional therapy because the recipient “‘needs’ more intense services than the school provides.”

That holding rests on the principle that “Medicaid may not pay for two services if both services have the same intended outcome or result with respect to the medical condition the services are intended to address.” Id. at 4. The Department has made it clear that the “intended outcome” test must be read broadly. In DHA Final Decision No MPA-49/82886, a decision reiterating the principle laid down in MPA-37/80183, the Department’s then -Deputy Secretary pointed out that the intended outcome was the same if both therapists were working to develop similar functional skills. The unstated rationale underlying the deputy secretary’s decision is that federal law requires school districts to meet the special needs of its students and the department will not allow a district’s failure to comply with this obligation provide the reason for funding another source of therapy.

During the fair hearing process, it is generally accepted that the state or county agency, as the party which has taken the action appealed from bears the burden of proof of the propriety of that action. See *State v. Hanson*, 98 Wis.2d 80, 295 N.W.2d 209 (Ct.App.1980). Like most public assistance benefits, however, the initial burden of demonstrating eligibility for any particular benefit or program at the operational stage falls on the applicant, *Gonwa v. Department of Health and Family Services*, 2003 WI App 152, 265 Wis.2d 913, 668 N.W.2d 122 (Ct.App.2003). In other words, it was petitioner’s burden to demonstrate that he qualified for the requested private speech and language services during the summer of 2012.

An applicant needs to demonstrate that the procedure for which he seeks approval is “medically necessary.” A “medically necessary” service is

[A] medical assistance service under ch. DHS 107 that is:

- (a) Required to prevent, identify or treat a recipient’s illness, injury or disability;
and
- (b) Meets the following standards: . . .

5. Is of proven medical value or usefulness and, consistent with s. HFS 107.035, is not experimental in nature;

6. Is not duplicative with respect to other services being provided to the recipient;
. . .

9. Is the most appropriate supply or level of service that can safely and effectively be provided to the recipient.

Wis. Admin. Code §DHS 101.03(96m).

The Department appeared by written summary. The Department contends that the services requested by the Petitioner are not medically necessary as that term is defined above because the request does not meet the criteria in subsections 5, 6 and 9.

With regard to the services not being of proven medical value or usefulness, the Department contends that the therapy services the Petitioner receives in school provide a consistent environment for establishing carryover into other environments. In addition, the Department argues the private speech language therapy plan of care does not indicate there is a specialized skill or technique that only the private therapist can complete. Further, the Department asserts that both the school IEP and the private therapy plan of care have the same outcome. Finally, the Department contends that the Petitioner is not demonstrating progress and additional therapy is not of proven medical value.

The Department states that the services do not meet the criteria in subsection 6 because the requested service is duplicative with respect to the services being provided in the school.

The Department finally argues that the services do not meet the criteria of subsection 9 requiring the services to be the most appropriate supply or level of service that can safely and effectively be provided to the recipient. The Department contends that there is no evidence that the requested services must be provided by a skilled therapist. It asserts that the plan of care includes tasks that the school and family can provide to the Petitioner.

The Petitioner's mother testified on his behalf at the hearing. She stated that the Petitioner does not receive speech language therapy from Milwaukee Public Schools at this time. The IEP only allows for 10 minutes of speech language therapy "consult." At the time of the hearing, the Petitioner's mother indicated that they are hopeful that Petitioner will be admitted into a school that can provide Petitioner with some services.

The Petitioner's mother disputes the Department's argument that the Petitioner is not making any progress in speech language skills. She submitted a letter from the provider indicating that in the three sessions approved from the last PA, the Petitioner was able to communicate a request for an object or item via picture with moderate assist. In addition, the family affirms that he has been able to spontaneously make requests via pictures. Further, the Petitioner's mother indicated that the Petitioner has shown an interest in a communication device at school that he previously was unable to use. She states that this demonstrates that he is ready to learn to communicate.

It could very well be that Petitioner requires more intensive private therapy than school can provide. The record does not demonstrate clearly why the Petitioner was receiving 60 minutes of therapy each week at school in 2011 but is now only receiving 10 minutes each week. However, the request must show that need and why the school services are insufficient. Here, the school records indicate that the IEP goal and the private therapist plan of care have similar outcomes and goals. In addition, the school is providing access and training with an augmentative communication device.

Further, though there is anecdotal evidence that the Petitioner has made some progress in the three months with a home program, there was no measurable evidence provided to allow me to conclude that actual progress occurred as a result of the private therapy. There was also insufficient evidence to demonstrate why clinic-based therapy was required for the services requested.

Based on the evidence, I affirm the Department's finding that the services requested in this PA do not meet the "medically necessary" criteria in the regulations. I note that this does not preclude the Petitioner from submitting future requests if the Petitioner's provider and family believe they can demonstrate the criteria for approval can be met.

CONCLUSIONS OF LAW

The agency properly denied the Petitioner's PA request for speech language therapy services.

THEREFORE, it is

ORDERED

That the petition be, and hereby is, dismissed.

REQUEST FOR A REHEARING

This is a final administrative decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a rehearing. You may also ask for a rehearing if you have found new evidence which would change the decision. Your request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

To ask for a rehearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875. Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST." Your request for a rehearing must be received no later than 20 days after the date of the decision. Late requests cannot be granted.

The process for asking for a rehearing is in Wis. Stat. § 227.49. A copy of the statutes can be found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the appropriate court no more than 30 days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

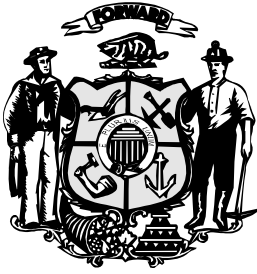
For purposes of appeal to circuit court, the Respondent in this matter is the Department of Health Services. After filing the appeal with the appropriate court, it must be served on the Secretary of that Department, either personally or by certified mail. The address of the Department is: 1 West Wilson Street, Room 651, Madison, Wisconsin 53703. A copy should also be sent to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for appeals to the Circuit Court is in Wis. Stat. §§ 227.52 and 227.53.

Given under my hand at the City of Milwaukee,
Wisconsin, this 21st day of September, 2012

Debra Bursinger
Administrative Law Judge
Division of Hearings and Appeals

c: Division of Health Care Access And Accountability - email
Department of Health Services - email



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The preceding decision was sent to the following parties on September 21, 2012.

Division of Health Care Access And Accountability